1949

Sidney Stevens Implement Company v. C. K. Bowerbank : Brief of Respondent

Utah Supreme Court

Samuel C. Powell; Samuel H. Barker; Attorneys for Defendant and Respondent

Case No. 7337

IN THE

SUPREME COURT

OF THE STATE OF UTAH

SIDNEY STEVENS IMPLEMENT COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

C. K. BOWERBANK,

Defendant and Respondent.

Respondent's Brief

SAMUEL C. POWELL,
SAMUEL H. BARKER,
Attorneys for Defendant and Respondent

INDEX

INDEX

IN THE

SUPREME COURT

OF THE STATE OF UTAH

SIDNEY STEVENS IMPLEMENT COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

C. K. BOWERBANK,

Defendant and Respondent.

STATEMENT OF FACTS

The plaintiff and the defendant are the owners of tracts of land situate on the East side of Ogden Avenue between Twenty-fifth and Twenty-sixth Streets in Ogden City. The parties, on the 11th day of December, 1945, entered into a party wall agreement. (Exhibit A) The agreement provided that the party wall, when constructed, should be one (1) foot in thickness with piers installed therein for the support of the roof, one-half of which was to stand upon the lot of each party for the full length of one hundred (100) feet. The agreement recites that the plaintiff was to erect a building upon its lot, the South wall of which was to be used as a party wall between the parties.

The plaintiff had employed H. J. Craven & Sons, Engineers, to survey the premises and locate the division line.

The agreement grants the defendant the right to use the party wall for the whole length, or any part thereof, in relation to the construction of a building which the defendant may thereafter construct, and to sink joists into the wall to the extent of six (6) inches. The agreement further provided that:

> "That said party of the second part * * * shall as soon as the building to be constructed by the party of the first part shall have been completed to the point where the total cost of the South wall shall have been ascertained, shall pay to said party of the first part or its assigns the full one-half of the total cost of said South wall."

The agreement also provided that the boundary line fixed by plaintiff's surveyor and marked upon the premises was to be considered the center line of the South wall, half of which was to be constructed on each side of said line so established.

The agreement provided for other usual provisions ordinarily contained in party wall agreements, which are not material to the issues in this case.

Prior to the construction of the wall, it was ascertained by the defendant that the survey made by H. J. Craven & Sons was not the correct survey and did not establish the true division line between the properties of the plaintiff and defendant. (Tr. 105) The defendant employed William Stowe, a licensed surveyor and an

engineer employed by Ogden City, to survey the land of the defendant and to establish the division line between the properties of the plaintiff and the defendant, and by such survey it was discovered that the line established by Craven was upon the property owned by the defendant and South of where it should have been. (Tr. 108-109) This fact was called to the attention of the plaintiff's officers and by mutual agreement between the officers of the plaintiff and the defendant, the true division line between the properties was established and agreed upon by the parties, and the division line was marked upon the sidewalk in front of said properties adjacent to the property line. It was then agreed by the parties that the center of the wall should be constructed on that line so established. (Tr. 107-108) Plaintiff proceeded with the construction of its building and the party wall.

After the completion of the building, the defendant discovered that the party wall, being the South wall of plaintiff's building, was built 10¾ inches South of the division line as established by the Stowe survey and wholly upon the property of the defendant. (Tr. 109) The wall was constructed during the winter time, and the survey mark was covered with snow, scaffolding, and other debris, and the defendant consequently did not discover the error in its location until after the removal of the snow, scaffolding, and debris, and after the completion of the wall. (Tr. 116-117)

Upon completion of the party wall, the plaintiff claimed the cost thereof amounted to $4,435.00, and demanded that the defendant pay one-half of this sum.

The defendant refused to pay this amount contending that such sum was not the cost of the wall. After the completion of the wall, the defendant obtained from C. B. Lauch Construction Company, plaintiff's contractor, a statement showing that the total cost of the party wall was $2,530.00, (Exhibit 1) and offered to pay the plaintiff one-half thereof, being the sum of $1,265.00. The plaintiff refused to accept this amout and filed suit to recover the sum of $2,217.50. The defendant claimed that the party wall was built entirely upon his land, the center line of which was 10¾ inches South of the true property line. The defendant filed an answer to plaintiff's complaint, alleging that the total cost of the wall was $2,530.00 and admitted that he was indebted to the plaintiff in the sum of $1,265.00, and filed a counterclaim in the amount of $1,000.00 for damages suffered by reason of the plaintiff constructing the party wall on land of the defendant, and asserting that the defendant was only indebted to the plaintiff, therefore, in the amount of $350.00. The case was tried by a jury and was submitted by the Court to the jury upon the four special interrogatories as set forth in appellants brief, and the interrogatories were answered as set forth in said brief. (Page 6) On the 30th day of December, 1948, judgment was entered in favor of the plaintiff in the sum of $1,375.00, with interest, and for the defendant judgment was entered as damages which he suffered for the encroachment on his land in the amount of $151.42, with interest, which was set off against the amount of plaintiff's judgment, leaving a balance due the plaintiff in the amount of $1,223.58, with interest from May 1, 1946.

The plaintiff filed a motion for a new trial. The motion was denied on the ground that it was not filed in time. The plaintiff then moved the court to file a motion for a new trial beyond the statutory time. This motion was supported by an affidavit of plaintiff's counsel. Defendant objected to granting of motion. The objection thereto was supported by affidavit of defendant's counsel denying material allegations set forth in the affidavit of plaintiff's counsel. The court then denied the motion and refused to grant the relief sought thereby.

ARGUMENT

POINT 1.

DEFENDANT IS NOT BOUND BY STATEMENT MADE BY BIDDER TO PLAINTIFF QUOTING COST OF WALL, DEFENDANT NOT BEING A PARTY TO SUCH BID OR AGREEMENT FOR CONSTRUCTION OF PLAINTIFF'S BUILDING PURSUANT TO SUCH BID.

The party wall agreement executed between the plaintiff and defendant, a copy of which is attached to plaintiff's complaint and marked "Exhibit A" (Page 003) (also plaintiff's "Exhibit A") was executed by the plaintiff and the defendant on the 11th day of December, 1945. The agreement provided for the construction of a party wall, one foot in thickness. The agreement further provided:

> "The said party of the second part * * * shall as soon as said building to be constructed by the party of the first part shall have been completed

to a point where the total cost of the South wall shall have been ascertained, shall pay to the party of the first part, or its assigns, the full one-half of the total cost of said South wall."

It will be noted that general specifications in relation to the construction of plaintiff's building were prepared by Art Shreeve, plaintiff's Architect, (plaintiff's Exhibit B) which bears date of December 1st, 1945. There is, however, an addendum to these specifications, shown in this exhibit on the last page thereof, dated December 26, 1945. The contract for the construction of the building was entered into between C. B. Lauch Construction Company and Sidney Stevens Implement Company, the plaintiff herein, on the 26th day of December, 1945. The general specifications (plaintiff's Exhibit B, page 19) provided that:

"All exterior walls shall be 12 inch walls, partitions 6 inches. Front elevation shall be Face Brick, selected by Architect, balance of exterior walls common brick, and partitions, tile."

The specifications (plaintiff's Exhibit B, page 20) provided that the contractor is to state in his bid a lump sum amount for the construction of the South wall.

The bid of C. B. Lauch Construction Company bears date of December 17, 1945. On the 18th day of December, 1945, a letter was written by C. B. Lauch (plaintiff's Exhibit D) in which a quotation for a *brick wall* with excavation, footings, and reinforced steel columns, according to plans and specifications, is addressed to the plaintiff's Architect, quoting the sum of $4,435.00. This

was prior to the signing of the contract between the plaintiff and the Lauch Construction Company for the construction of plaintiff's building. On the 26th day of December, 1945, on the date contract was signed, an addendum was added to the contract (see last page Plaintiff's Exhibit B) whereby a change was made in the construction of the Exterior walls and which is as follows:

> "*Exterior Walls*: Change to read as follows: Front elevation 12" face brick. Balance of walls to be constructed of Lava Ash Blocks, as manufactured by the "Utah Concrete Pipe Company", size 10" x 16"."

The quotation given by C. B. Lauch Construction Company, in connection with its bid, was based upon the construction of a 12 inch brick wall, the specifications being changed subsequent to the quotation and, therefore, the quotation of the purported cost is not material, under any circumstances, in determining the cost of the wall.

It should be noted that the party wall agreement provided for the construction of the party wall one foot in thickness. The plaintiff failed to carry out the terms of its agreement with the defendant in that the wall actually constructed was but 10 inches in thickness. The defendant asserts that an attempt on the part of the plaintiff to fix the cost of the wall prior to the construction of it, violates the terms of the party wall agreement in that the agreement expressly states:

> "Party of the second part * * * shall as soon as the building to be constructed by party of the first

part *shall have been completed to the point where the total cost of the South wall shall have been ascertained shall pay * * * the full one-half of the total cost.''*

While the defendant asserts that he is not bound by the contract entered into between the plaintiff and C. B. Lauch Construction Company, insofar as the quotation for the cost of the wall is concerned, still there is no evidence before the Court as to any compliance by the contractor with the plaintiff, as provided in its specifications, in fixing the total cost of the South wall of the building after the change in construction from a 12 inch brick wall to a 10 inch Lava Ash Block wall.

There is, however, before the Court, evidence introduced by the defendant, that after the construction of the wall, the defendant requested the C. B. Lauch Construction Company to furnish him a statement of costs of the wall to the plaintiff (see testimony of Jack Hilton, Tr. 31-32 and 33). Hilton, Superintendent of the C. B. Lauch Construction Company, after taking into consideration the entire contract price of the building, computed the cost of the party wall to be $2,530.00 (defendant's Exhibit 1). The construction of the party wall was not completed until about May, 1946 (Tr. 31). Jack Hilton was employed by C. B. Lauch Construction Company as Superintendent upon the construction of the party wall in April, 1946. (Tr. 23) The statement which was furnished the defendant setting forth the cost of the party wall, was given by Jack Hilton at the direction of C. B. Lauch. (Tr. 47) The plaintiff is bound by the statement of his own contractor establishing the cost of the party wall.

The defendant has been at all times willing to pay for the one-half of the actual cost of the party wall, but has been unwilling to pay the amount which plaintiff seeks to impose upon him, which is excessive. It should be observed that the contract cost of the entire building includes the cost of construction of the other three walls, the cement floor, roofing, wiring, plumbing, stairs, excavation, back filling, vault, ramp, lathing, plastering, painting, hardware, glazing (including plate glass windows on front of building), face brick on front, and all steel (except structural steel to be furnished by plaintiff, but installed by contractor), and all necessary materials and work to be done in connection with the completion of plaintiff's building. The plaintiff seeks to establish the cost of the party wall to be in excess of ¼ of the entire cost of plaintiff's building. Such cost is obviously exorbitant and beyond all reason.

If the cost of a party wall were permitted to be established by such a method where the adjoining owner was not a party to the building contract, under plaintiff's theory, any price which was fixed by the parties to the contract between themselves, would establish the cost of such wall, which the other party would be obligated to pay. Defendant contends that this is not good law. Such a method would open the doors to collusion and fraud. In other words, the defendant believes that he has not been billed for his portion of the total cost of the wall, but for the cost of the wall and a substantial portion of the balance of plaintiff's building.

The Court instructed the jury upon the method of determining the cost of the party wall as follows: (023).

"You are instructed that under the terms and provisions of the party wall agreement entered into between the plaintiff and the defendant, the defendant agreed to pay to the plaintiff one-half (½) of the costs incurred by plaintiff in the construction of the party wall and in this connection you are instructed that cost and reasonable market value are not synonymous terms. The word "cost" as used in this agreement means the actual cost to the plaintiff for the construction of said party wall. That is, the amount which the plaintiff actually paid to the contractor for the construction of the wall in question. This amount includes not only the cost of the materials and labor to the contractor, but in addition thereto the amount he charged for his overhead and profits. So it is for you to determine from all of the evidence in this case what was the amount which the contractor charged the plaintiff for the building of the wall."

Upon such instruction and after deliberation, the jury, from the evidence concluded that the total cost of the wall to the plaintiff amounted to $2,750.00, thereby fixing the amount which the defendant was to pay in the sum of $1,375.00.

POINT II.

THE COST OF THE PARTY WALL IS ESTABLISHED BY TESTIMONY OF CONTRACTOR CONSTRUCTING SAME AFTER COMPLETION OF WALL AND SUBSTANTIATED BY OTHER COMPETENT CONTRACTORS.

The testimony of Jack Hilton, employed as Superintendent in the construction of the Stevens Building, was

conclusive evidence to establish the actual cost to the plaintiff of the party wall. All of the figures of Mr. Lauch which were used in the preparation of the bid were offered in evidence and Jack Hilton computed the cost of the party wall upon such figures, including the overhead of the contractor and the percentage of profit charged on the entire building. (Defendant's exhibit 3, Tr. 96½ and 97).

Testimony was given by other contractors as to the cost of the party wall. Fred Carr, Jr., of the Clarence Waterfall Company, computed the total actual cost at $2,348.87. (Defendant's Exhibits 5, Tr. 57). Attention should be called to the fact that Carr figured the profit of the contractor at 15% rather than 10% which was used by Lauch in his estimate. (Tr. 60)

Another contractor, Andrew Isaakson, computed the cost of the wall to the plaintiff at approximately $2,500.-00 (Tr. 89). The testimony of these two contractors substantiates the evidence given by Jack Hilton as to the cost of the party wall and is proper evidence to establish cost of the wall.

Kempf vs. Ranger
155 NW 1059. (Minn.)

It was brought out on cross-examination of Mr. C. H. Stevens, President of Sidney Stevens Implement Company, that the full contract price of the building had never been paid Lauch Construction Company, and that Lauch Construction Company had filed suit in the District Court of Weber County against Sidney Stevens

Implement Company for the sum of $1,579.52. (Tr. 18) Plaintiff's Counsel attempts to use this fact as a reason why Jack Hilton' Lauch's Superintendent, appeared as a witness for the defendant. We contend that this is no proper deduction on the part of such counsel. Jack Hilton is now no longer employed by C. B. Lauch Construction Company, nor was he in the employment of such Company at the time his testimony was given in the trial of this action. (Tr. 22) It is true that C. B. Lauch had gone to Boise, Idaho, to engage in the contracting business. The plaintiff, however, had the opportunity of taking Lauch's deposition, but failed to do so. It is true that C. B. Lauch wrote a letter (Plaintiff's Exhibit L) to one of the counsel for the defendant on the 17th day of November, 1947, just prior to the commencement of this action, which purported to state the cost of the party wall as $3,127.00. Mr. Young requested defendant's counsel to produce this, and then offered it in evidence. The testimony of Jack Hilton, (Tr. 35) however, reveals that at the time that Lauch wrote this letter, he did not have the data concerning the construction of the Sidney Stevens Building; that all of this information, and even at the time of the trial of this case, was in the hands of Jack Hilton.

POINT III.

THE BOUNDARY LINE BETWEEN THE PROPERTIES OF THE PARTIES WAS ESTABLISHED BY MUTUAL AGREEMENT, COMPROMISING A DISPUTE BETWEEN THE PARTIES ARISING AFTER EXECUTION OF PARTY WALL AGREEMENT AND CRAVEN SURVEY, AND DOES NOT COME WITHIN THE PROVISIONS OF THE STATUTE OF FRAUDS.

It is to be admitted that the surveys of the two surveyors, that is Craven, who was employed by the plaintiff, and Stowe, who was employed by the defendant, conflicted. There was evidence introduced in relation to these conflicts by both parties. Plaintiff, however, contends that the parties, by the terms of the party wall agreement, established a line by mutual agreement based upon the Craven survey. Defendant's position, is that prior to the time of commencing construction of the building, it was ascertained that an error was made in the Craven Survey. The fact of this error was called to the attention of the officers of the plaintiff corporation. (Tr. 105-106-107 and 149) Mr. Frank J. Stevens, Jr., Secretary and Treasurer of the plaintiff corporation, testified that when such discrepancy was called to his attention, he (Stevens) and Bowerbank, in company with the architect, Mr. Lauch, and Mr. Richardson (Mr. Lauch's superintendent at the time) went to the building location and agreed upon a boundary line between the properties and made a mark on the sidewalk opposite the line agreed upon (Tr. 149-150), and agreed that the party wall should be so constructed that the center of the same would be upon such boundary line.

The evidence also shows, through the testimony of Mr. Bowerbank, that prior to the time that Frank J. Stevens, Jr., and he, went to locate the center line of the party wall, a discussion was had in the office of the Sidney Stevens Implement Company concerning the same. In addition to Bowerbank and Frank J. Stevens, Jr., being present, there was Stowe, the suveyor, and C. H. Stevens, President of the Sidney Stevens Imple-

ment Company. The evidence also shows that they agreed at that time to use the Stowe survey (Tr. 107) and C. H. Stevens, the President of the Sidney Stevens Implement Company, sent Frank J. Stevens, Jr., Secretary and Treasurer, down to the lot line, and that the foreman of the Lauch Construction Company was told jointly by Frank J. Stevens, Jr., and Bowerbank where to place the party wall, which was not upon the Craven Survey, but upon a new line agreed upon two inches North of Stowe survey. (Tr. 107).

Plaintiff contends that this oral agreement was in violation of the Statute of Frauds and cites several authorities in support. We submit that the cases cited by the plaintiff are not in point with the instant case. The cases cited hold that title or any interest in real estate cannot be transferred or conveyed unless by written instrument. In this case there was a dispute as to the location of the true boundary line between the properties of the parties to this action. The dispute did not arise until after the survey had been made by Craven and after the execution of the party wall agreement. A new agreement fixing the boundary line was entered into between the parties, which agreement superseded the prior one and which was executed by the marking of the line and the instructions to the contractor to proceed with the erection of the party wall on the line agreed upon. Such oral agreement between adjoining owners establishing a boundary line which was uncertain does not come within the provisions of the Statute of Frauds, and does not violate the provisions of the Laws of the State of Utah in relation to conveyance of real estate, neither does it violate the parol evidence rule.

Tietjen vs. Dobson, 152 SE 222 (Georgia)
69 ALR 1408

Tripp vs. Bagley, 74 Utah 57
276 Pac. 912
69 ALR 1417

Bemis vs. Bradley, 139 Atl. 593 (Maine)
69 ALR 1399
8 Am. Jur. 801
69 ALR 1430
131 ALR 421

Defendant submits that the case of Tripp vs. Bagley, 74 Utah 57, cited by theplaintiff is favorable to the defendant's position. This case holds that where there is a dispute about the true boundary line between property owners, a parol agreement establishing such boundary line is valid and not within the Statute of Frauds. The Supreme Court of Utah, in the case of Tripp vs. Bagley, quotes with approval Tiffany on Real Property, Volume 1 (2d ed.) 294:

> "An agreement between adjoining owners as to the location of a boundary line, though merely oral, is not, it is generally conceded, invalid as being within the Statute of Frauds, provided the agreement is followed by actual or constructive possession by each of the owners up to the line so agreed upon, and provided further, that the proper location of the line is uncertain or in dispute; the theory being that the agreement does not, in such case involve any transfer of title to land, but merely an application of the language of the instruments under which the owners claim."

The plaintiff and the defendant took constructive possession of the land on each side up to the line so agreed upon, by marking the line, and by instructing the foreman of the Construction Company to construct the center of the party wall upon such line.

The case of Bemis vs. Bradley above quoted, holds:

> "An agreement fixing a boundary line under the belief that it is the true line, when in fact it is not, is not binding and may be set aside by either party when the mistake is discovered, unless some principle of estoppel prevents it, as where the rights of innocent third parties have intervened."

> "The weight of authority is that, where the intention was to establish a line according to the true boundary, and by mistake the parties agreed upon a line which does not conform to such a boundary, the line so agreed on is not conclusive and the agreement may be set aside by either party."

Under the ruling in this case the defendant is not bound by the designation of the boundary line between the properties as surveyed by Craven when it was afterwards ascertained that there was a mistake in such survey.

POINT IV.

DEFENDANT SUFFERED DAMAGES BY ENCROACHMENT OF PARTY WALL UPON HIS

PROPERTY AT LEAST TO THE MARKET VALUE OF LAND TAKEN BY SUCH ENCROACHMENT.

The Court permitted testimony as to the value of defendant's land upon which plaintiff encroached as the measure of damages suffered by the defendant of such encroachment. The plaintiff contends that if the defendant were entitled to damages, the measure of the same should be the difference between the value of defendant's property before and the value of the property after the encroachment. Even if this method were the proper method for determining the measure of damages, the only one who would be prejudiced by failure to follow such method of determining the resulting damages, is the defendant himself. He would be entitled at least to the value of the land by the encroachment.

The plaintiff cites 2 C. J. S. 33. The case cited in support of the text statement is Goldsmidt vs. Mayor of New York, et al, 14 App. Div. 135, 43 N. Y. S. 447. This case substantiates the defendant's theory. While such decision holds that the proper measure of damages for a permanent encroachment is the difference in value of the premises encroached upon before and after such encroachment, it implies that the damages suffered is not only the value of the land taken, but may include additional damages for diminution of value of the whole of such premises. The defendant in the Goldsmidt case claimed that the measure of damages was the actual or market value of the land taken by the encroachment. The New York Court in the decision states:

> "It seems to be conceived by the defendant that he is only liable here for the actual value of the property, and the value is to be estimated by

finding out how much of the land of the plaintiff was worth a square foot, and charging the defendant for the number of square feet taken at that rate. It is quite clear that this is entirely erroneous. The depreciation to a city lot by encroachment upon it is not necessarily to be measured in that way. It depends entirely upon other considerations. If one builds a wall upon his neighbor's land along the side or the rear of it, it may be that the damages in that case would be largely measured by the amount of land taken, although other considerations would undoubtedly enter into the damages in such a case as that, but where the encroachment is along the front of the lot, it is easy to say that an entirely different mode of reaching the damages must be arrived at. The injury to plaintiff's premises in such a case does not depend upon the amount of the land taken but upon the value of the land which is left, and that, as may easily be seen, is governed not only by the situation and the location of the land that is left, but by the place where the encroachment is made. If a man should put a column in the middle of his neighbor's City lot the damages would be much more serious than it would be if the same erection were put in the corner of the back end of the lot, and nobody would say that in either case the trespasser was to be charged simply with the value of the square foot of land, which he had taken possession of."

POINT V.

TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND PLAINTIFF'S MOTION FOR RELIEF UNDER SECTION 104-14-4.

The plaintiff charges error on the part of the Court in denying the motion for a new trial, upon the ground that it was not filed within time, and cites error in not permitting the plaintiff to file a motion for a new trial beyond the statutory time. Plaintiff quotes certain rules of the District Court which require the giving of notice by the Clerk of the signing of Findings of Fact, Conclusions of Law, and Decree. The rule which the plaintiff relies upon is Rule 17, which provides as follows:

> "Notice by Clerk of Decision: When a decision is rendered by the Court upon a matter under advisement or in the absence of counsel, such counsel as were absent shall be given, by the Clerk, written notice of the desicion by mail. Such notices shall contain the name and number of the case, a statement of the decision such as 'Defendant's demurrer overruled' or 'Judgment for plaintiff'."

This rule applies to matters which are taken under advisement and does not apply in the instant case, where the verdict had already been rendered and plaintiff's attorney at the direction of the Court, had prepared and served upon defendant's counsel and had submitted to the Court Findings and Judgment on verdict. The case of

> Cody vs. Cody, 47 Utah 456
> 154 Pac. 952

is decisive in this matter. In this decision it is stated:

> "The party who prepares the Findings and Conclusions, and Decree, must of necessity * * * be deemed to have notice of the decision, and thence is not entitled to notice thereof."

Plaintiff's counsel contends that he had no knowledge that the Findings and Judgment had been signed on December 30, 1948, until several days afterwards, and that immediately upon learning that they had been signed, plaintiff's counsel prepared, served and filed notice of intention to move for a new trial on January 6, 1949. The plaintiff's motion asking for relief to file out of time, was supported by the affidavit of plaintiff's counsel (page 048). This was objected to by the defendant and his objection was supported by affidavit of Samuel C. Powell, one of counsel for the defendant, (Page 044-045) countering and denying the material allegations set forth in affidavit of plaintiff's counsel. The Court considered the record and both affidavits and denied the motion. The trial Court was the judge of the facts and did not abuse its discretion in denying the motion.

CONCLUSION

The defendant asserts that thejudgment of the Trial Court should be affirmed.

Respectfully submitted,

SAMUEL C. POWELL,

SAMUEL H. BARKER,

Attorneys for Respondent.